

PROBATE

1. QUESTION: WHAT IS PROBATE?

ANSWER: Probate is the procedure of settling the estate of a deceased person. The estate of one who has died consists of the property that person owned upon death. Probate re-titles a decedent's property and puts it into the designated beneficiary's name. A person's estate is probated in the domicile state (or legal residence) of that deceased person. The legal residence means the place where one is entitled to vote, is required to pay state income taxes, and considered (through words and actions) to be his or her home. When the courts try to determine this, they often look at where a person owns a home, where the person's car is titled and registered, where one's driver's license is issued, and where a person has bank accounts. For California probates, an excellent resource is *How to Probate an Estate in California*, Nolo Press.

2. QUESTION: WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF PROBATE?

ANSWER: Advantages - Probate proceedings are controlled by a judge, who can decide disputes between heirs or between heirs and the executor. Creditors are required to submit their claims against the estate within a four-month period, provided they have been notified of the probate. The executor is required, in most cases, to prepare an accounting and report of the executor's activities.

Disadvantages - The cost of probate is usually higher than that required for the administration of a living trust for an estate valued at the same amount. Additionally, it usually takes longer to probate an estate than to administer a trust. Most estates don't need the supervision of the court (through probate) unless disputes occur.

3. QUESTION: WHO IS RESPONSIBLE FOR PROBATING MY ESTATE?

ANSWER: If you have made a will, you have probably named such a person, called an Executor or Personal Representative, in that document. If you have no will, the court will appoint someone, usually a family member, to be the Administrator of your estate for this purpose.

4. QUESTION: DOES MY SMALL ESTATE HAVE TO BE PROBATED?

ANSWER: In California, estates that are valued at more than \$100,000 (including only probate assets) generally have to be probated. There are exceptions made if the decedent is survived by a spouse. If an estate includes real property it must be probated if the real property is greater than \$30,000.

5. QUESTION: HOW DO I AVOID PROBATE?

ANSWER: Avoiding probate is easy if you plan ahead. The easiest way is to complete a current and accurate will. Furthermore, many estates do not need to be probated. For example, if there is a surviving spouse, a spousal property petition might be used. Living Trusts and Joint Tenancy are among the methods of avoiding probate.

- Living Trusts: Assets owned through a living trust do not need to be probated.

- Joint Tenancy: If an asset is owned by two or more people as joint tenants, it will usually not be probated. These assets can be identified by the words "joint tenants," or "in joint tenancy," "JT TEN," or similar wording. When a joint tenant dies, the other joint tenant takes 100 percent ownership of the asset. This occurs regardless of the provisions of the will or trust of the deceased joint tenant. If this is what the parties intended, then joint tenancy might be beneficial to them. Otherwise, they should use some other form of ownership, such as tenancy in common.

Joint tenancy is not recommended for assets that can increase in value, such as a residence, because the surviving joint tenant will not receive a "stepped up cost basis" to fair market value at the date of death of the other joint tenant.

6. QUESTION: WHAT ARE THE DUTIES OF MY EXECUTOR OR PERSONAL REPRESENTATIVE?

ANSWER: The executor's duties are the same as those of the administrator. They include the obligations to:

- a. Safeguard the property and assets of the estate;
- b. Inventory (or make a list of) the property;
- c. Submit accounts or inventories to the court as required;
- d. Pay the debts and expenses of the deceased (such as funeral and burial expenses, medical expenses, and credit card bills);
- e. Pay any federal and state death taxes (California has no death tax); and
- f. Distribute the estate to those named in the will or, if no will exists, to your heirs as designated by statute.

7. QUESTION: WHO PAYS FOR ALL THIS?

ANSWER: Your estate does. In general, your estate is responsible for all your debts, bills and expenses. These must be paid before any remaining assets can be given to your heirs or your beneficiaries under the will. Your executor has no duty to pay these costs out of his or her own pocket. Your executor must release enough of your assets to allow the payment of these expenses.

8. QUESTION: IF I AM APPOINTED AS SOMEONE'S EXECUTOR, DO I GET PAID?

ANSWER: An executor or an administrator -- can request the court to allow payment:

- a. For out-of-pocket expenses, such as postage stamps, bank charges and mileage; and
- b. For services rendered as an executor or administrator unless the will directs otherwise.

The amount of this latter payment will vary, of course, depending on the amount of work done, the time spent working on the estate, the complexity of the work and the size of the estate.

9. QUESTION: DOES MY EXECUTOR HAVE TO PAY A FEE OR POST A BOND TO SETTLE MY ESTATE?

ANSWER: Ordinarily an executor or administrator will have to post a bond if he or she is from outside the state where the probate takes place or if he or she is administering assets for minor children. A will can waive the posting of a bond.

10. QUESTION: HOW DOES MY EXECUTOR NOTIFY MY CREDITORS?

ANSWER: Once a person officially assumes the role of administrator/executor, a four month creditor's claims period follows. During this time, creditors of the decedent can file a claim. It is the duty of the executor or administrator to notify directly by mail any creditors who are known at the time of your death. It is also the duty of the administrator/executor to determine the validity of any resulting creditor claims and to pay them from estate funds if they are valid.

Your executor/administrator must also place a legal notice in the local newspaper informing creditors of your death. This is done shortly after your executor/administrator has been appointed by the court to handle your estate.

Once this is done, the publisher prepares an Affidavit of Publication and this is put in the court file. The executor or administrator pays for this notice with the funds of the estate. Any claims not presented to the executor or administrator within this period need not be paid under most state laws. Those claims which are held valid and which are presented within this period, including any other debts and expenses known to the executor or Administrator, must be paid out of the available funds in the estate. The estate cannot be closed and the probate cannot be finished until all creditors claims have been satisfied one way or another.

11. QUESTION: HOW LONG DOES AN AVERAGE PROBATE TAKE?

ANSWER: If the probate has no unusual problems, it can be concluded in about eight months. That period includes a four-month creditor's claims period, and the time it takes after a petition is filed before it is actually heard. Due to crowded court calendars, hearings are often held six weeks or more after the petition is filed. There may be other problems with creditors, taxes, or will contests that will delay the probate for longer periods.

12. QUESTION: HOW DO I HANDLE THE MONEY OF THE DECEASED?

ANSWER: First set up an estate account at a bank as soon as you have been appointed executor or administrator. You can arrange this at any local bank. There is a small charge for printing the checks showing your name and address, your title (executor/administrator), and the name of the deceased. Having a separate account prevents the mixing or "commingling" of your own personal funds and those of the estate. With this fund set up, you can deposit or transfer the funds of the deceased into this separate account. Some items, such as paychecks, insurance premium refunds or employee death benefits, may be deposited directly into the estate account.

13. QUESTION: ARE LIFE INSURANCE PROCEEDS PART OF THE ESTATE?

ANSWER: For tax purposes, life insurance proceeds are counted as part of the taxable estate if the policy was owned by the deceased. You must account for the proceeds of such a policy on the tax return (state and, if necessary, federal) of the estate. On the other hand, only life insurance proceeds payable to the estate are listed on the formal inventories filed with the Clerk. Those policies and proceeds made payable to individual beneficiaries pass by contract, outside of the estate, directly to the named beneficiary.

14. QUESTION: HOW IS REAL ESTATE HANDLED & IS A NEW DEED REQUIRED FOR LAND THAT IS PASSED ON BY THE DECEASED?

ANSWER: Some states require that a new deed be made. In addition, you should know that any real estate owned in part or wholly by the deceased in another state will have to be separately probated in that state. This is sometimes called an ancillary probate, and it often requires hiring an attorney (or at least consulting with one) in the second state so that the land is properly transferred to the intended recipient under the laws of that state. Personal property is only probated in the state of legal residence of the deceased. This is true regardless of where the personal property is located at the time of death. If, for example, SGT Jones is a legal resident of Texas but dies in Florida in a car accident, the personal property he has with him in Florida would still be subject to probate only in Texas.

15. QUESTION: ONCE I HAVE PAID ALL THE FEES AND EXPENSES AND ACCOUNTED FOR ALL THE PROPERTY, HOW DO I CLOSE THE ESTATE?

ANSWER: The steps are as follows:

- (1) A federal tax return is only required for an estate with combined gross assets and prior taxable gifts exceeding \$3,500,000 (effective for decedents dying on or after Jan. 1, 2009).
- (2) The next step is to distribute the estate among the heirs-at-law (if there is no will) or the designated beneficiaries (if a will has been admitted to probate). You should obtain a receipt from all heirs or beneficiaries stating that they have received their entire share of the estate of the deceased (signed, dated and witnessed).
- (3) After you have distributed or divided the property, submit those receipts along with the final inventory to the Clerk's Office. You will also need cancelled checks or "paid receipts" for all expenses, fees and bills that have been paid. Once the clerk is satisfied that you have accounted for all assets and expenses and you have properly distributed the assets and property, the estate will be closed.

16. QUESTION: WHAT IF I HAVE OTHER QUESTIONS?

ANSWER: See a legal assistance attorney or private attorney. Seeing a lawyer early may not only solve a problem you have, but it may also resolve or avoid a problem in the future, on this or other unrelated subjects. Our legal assistance office stands ready, willing and able to help you in these matters. Hours: Monday through Friday 0730-1630, Location: Building 275, Room 217, 1336 Plummer Street, Presidio of Monterey, CA 93944-3327, please call (831) 242-5084.